Pursuing climate justice through public interest litigation: the Urgenda case

Otto Spijkers 2020-04-29T09:00:47

This blog post critically examines the contribution of public interest litigation to the global fight for climate justice. I consider the Urgenda case, which culminated in the Netherlands' Supreme Court ruling of 20 December 2019, as an excellent example. Urgenda is a foundation, established under Dutch law, which claims to protect the public interest all of us have in a more sustainable society. It persuaded the Court to order the State of the Netherlands to reduce, by the end of this year (2020), greenhouse gas emission levels from the Netherlands by at least 25% compared with 1990 levels. This obligation was based on the human rights to life and wellbeing enjoyed by the people in the Netherlands.

How does this ruling contribute to climate justice? Why can it be qualified as a successful example of public interest litigation? To answer these questions, I first need to make clear what these terms mean. Michael Walzer once suggested, to an audience of international law scholars and political scientists to "never define your terms", because doing so will only get you into all sorts of trouble. A definition of a term might be too vague, it might be over- or underinclusive, it might lead to misinterpretation and misunderstanding, and the term's definition itself may contain terms that need to be defined, and so on. Having said that, I nonetheless provide the reader of this post with a rough description of what I understand with the terms "climate justice" and "public interest litigation", if only to make sure the reader and I are on the same page.

Following Alix Dietzel, I understand "climate justice" to be about fair distribution of burdens and responsibilities (distributive justice), and fair decision-making procedures (procedural justice) in the global fight against climate change. The term thus has both a substantive and a procedural dimension. The substantive dimension is primarily about who is responsible for climate change, and who is required to do what in the combat against it. The procedural dimension is primarily about who ought to be entitled to take part in decision-making relating to combating climate change. This includes not only those actors affecting the climate, but also those actors affected by climate change. Contributing and affected actors include States, international organizations, but also private actors such as multinationals, NGOs, and individuals. They encompass both representatives of present and future generations. After the actors are identified, some criterion for a fair distribution of benefits and burdens needs to be found within a fair decision-making procedure.

For a definition of public interest litigation, I refer to my earlier research, where I define it as a process in which foundations, established under domestic law to pursue a certain general interest, use the law as their tool or language, and the domestic court as their forum, to seek certain policy changes. The term "climate

litigation" refers to a subcategory of public interest litigation, *i.e.* public interest litigation *that pursues climate justice*.

According to Article 3:305A of the Dutch Civil Code, any foundation, which is established according to its own by-laws to protect a general interest, may bring to court any legal claim to protect that interest. Urgenda was established, according to its own by-laws to "to stimulate and accelerate transition processes towards a more sustainable society, beginning in the Netherlands". In its ruling, the Dutch Supreme Court agreed with Urgenda that, instituting legal proceedings against the Netherlands' Government, urging it to do more to prevent dangerous climate change, was indeed a way to stimulate transition towards a more sustainable society. Elsewhere, I have explained the controversies relating to Article 3:305A of the Dutch Civil Code, and the way it has been (ab)used by all kinds of NGOs to engage in public interest litigation. I will not elaborate on this here, but I agree with David Freestone and Laurence Boisson de Chazournes, when they claim that "[n]ongovernmental actors [like Urgenda] often play the role of self-appointed watchdogs against the national governments and can thus help in the enforcement of international law through […] public interest litigation to ensure that governments keep to their international environmental commitments".

How did the Urgenda ruling of the Netherlands' Supreme Court contribute to the global fight for climate justice? I will examine the substantive dimension of climate justice first. Climate justice, as explained by Alix Dietzel, "addresses questions such as who should be paying for climate change costs, which actors must lower their emissions, and what is owed to future generations."

In the Urgenda case, the Netherlands' Supreme Court addressed these questions on the basis of the legal framework provided by the European Convention on Human Rights (ECHR). Why did Urgenda base its claim on international human rights law, and not on international environmental law, or international climate (change) law? The reason is quite simple: the relevant provisions of the latter have no direct effect and can thus not be used *as legal basis* for a claim, by a private person like Urgenda, against the Netherlands Government, before the Dutch courts. Human rights *do* have direct effect.

The Supreme Court held that the Netherlands' Government must ensure that, by the end of this year (2020), greenhouse gas emission levels from the Netherlands are at least a quarter below 1990 levels, otherwise the Netherlands contributes to causing dangerous climate change, which breaches the rights to life and wellbeing, as guaranteed in Articles 2 and 8 ECHR respectively, of the people in the Netherlands. It is a fact that most greenhouse gases are emitted by private actors (industry, commercial companies). But it is the obligation of the State to ensure that they all reduce their emissions. This, ruled the Supreme Court, is a due diligence obligation, which is owed, by the State, to both present and future generations. In reaching this conclusion, the Court did also refer to international environmental law – the United Nations Framework Convention on Climate Change and the Paris Agreement were referred to numerous times – but not as legal basis of the claim. The obligation of the State of the Netherlands to do *its part* to combat global climate change was based on Articles 2 and 8 ECHR. The State was obliged to reduce greenhouse gas

emissions from its territory *in proportion to its share of the responsibility*. The other international agreements were used to determine that share of responsibility.

Now let me turn to the procedural dimension of climate justice. This is the most revolutionary and progressive part of the Urgenda ruling. Basically, the Netherlands' Supreme Court allowed foundations, established under Dutch law, to engage in public interest litigation to pursue climate justice ("climate litigation"). In the past, foundations mainly initiated proceedings to protect interests of a clearly defined group of people, such as people living near a polluting factory. Urgenda claimed to represent the interests of literally everybody. The Supreme Court accepted that Urgenda may represent the interests of the residents of the Netherlands with respect to whom the State's obligation to prevent dangerous climate change applies. Urgenda can thus demand legal protection for their benefit. In support of this conclusion, the Supreme Court referred not only to Article 3:305A of the Dutch Civil Code – see above – but also to Articles 9(3) and 2(5) of the Aarhus Convention. Article 9(3) Aarhus Convention requires States to "ensure that […] members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". And Article 2(5) of the same Convention makes clear that "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest [in environmental decision-making]". Urgenda is such an NGO. The Court also referred to Article 13 ECHR. Article 13 ECHR obliges States to offer "everyone whose rights and freedoms as set forth in this Convention are violated […] an effective remedy before a national authority".

How did the Urgenda ruling – a product of climate litigation – contribute to the global fight for climate justice? It did so in at least two ways: (1) it showed us how the substantive dimension of climate justice can be framed in the language of international human rights law; and (2) how climate litigation can influence decision-making relating to the fight against climate change (procedural dimension of climate justice).

What should be the next step? Urgenda used climate litigation against the Dutch State. But it can also be used against private actors. For example, friends of the Earth Netherlands ("Milieudefensie") initiated legal proceedings against Shell, before the Dutch court in The Hague. Milieudefensie argues that "Shell, with its current inadequate climate policy, like the State of the Netherlands, violates the right to life and the right to an undisturbed family life as stipulated in Articles 2 and 8 of the ECHR" (see para. 55 of the summons, available in Dutch original and English translation). In the summons, Milieudefensie explicitly referred to the Urgenda-ruling as precedent. Milieudefensie has made the fight for climate justice the central element of its latest policy plan. In this plan, we read that "[c]limate change is our urgent concern. Not only are we already confronted with the consequences on a daily basis, the future of our children is also at stake. We are the last generation that can do something about it. Milieudefensie feels that responsibility, and therefore focuses this new General Policy Plan on climate justice." (p. 4).

It remains to be seen if climate litigation on the basis of international human rights law can succeed against multinationals like Shell. The Court needs to be persuaded that Milieudefensie can base a claim against Shell on the ECHR, in spite of the fact that Shell obviously is not a Party to this treaty. If the Court can be so persuaded, we will have yet another tool in the fight for climate justice.

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Cite as: Otto Spijkers, "Pursuing climate justice through public interest litigation: the Urgenda case", *Völkerrechtsblog*, 29 April 2020.
